No. 13681

United States
Court of Appeals
For the Ninth Circuit

ERNESTINE C. SINISCAL AND ELMER A. REED,
Appellants,

v.

UNITED STATES OF AMERICA, AS TRUSTEE AND GUARDIAN AND EX REL. OF THE ESTATES AND PERSONS OF JASPER GRANT AND HAROLD F. THORNTON; HENRY B. TAYLOR AND ELIZABETH A. TAYLOR, HUSBAND AND WIFE; WILLIAM F. BRENNER AND FRED M. MARSH,
Appellees.

THE UNITED STATES OF AMERICA, AS TRUSTEE AND GUARDIAN AND EX REL. OF THE ESTATES AND PERSONS OF JASPER GRANT AND HAROLD F. THORNTON,
Appellant,

v.

ERNESTINE C. SINISCAL, ELMER A. REED, HENRY B. TAYLOR AND ELIZABETH A. TAYLOR, HUSBAND AND WIFE, AND S. D. ALEXANDER,
Appellees.

Upon Appeals From the United States District Court for the District of Oregon

Brief for Appellees Henry B. Taylor and Elizabeth A. Taylor, Husband and Wife, in Answer to Appellants and Cross Appellant The United States of America, as Trustee and Guardian and Ex Rel. of the Estates and Persons of Jasper Grant and Harold F. Thornton

WILBER HENDERSON,
Counsel for Appellees Henry B. Taylor and Elizabeth A. Taylor.

HOUGHTON-CARSON COMPANY, PRINTERS

INDEX

TABLE OF CASES

TABLE OF CASES—Continued

FEDERAL RULES OF CIVIL PROCEDURE

No. 13681

United States
Court of Appeals
For the Ninth Circuit

ERNESTINE C. SINISCAL AND ELMER A. REED,
Appellants,

v.

UNITED STATES OF AMERICA, AS TRUSTEE AND GUARDIAN AND EX REL. OF THE ESTATES AND PERSONS OF JASPER GRANT AND HAROLD F. THORNTON; HENRY B. TAYLOR AND ELIZABETH A. TAYLOR, HUSBAND AND WIFE; WILLIAM F. BRENNER AND FRED M. MARSH,
Appellees.

THE UNITED STATES OF AMERICA, AS TRUSTEE AND GUARDIAN AND EX REL. OF THE ESTATES AND PERSONS OF JASPER GRANT AND HAROLD F. THORNTON,
Appellant,

v.

ERNESTINE C. SINISCAL, ELMER A. REED, HENRY B. TAYLOR AND ELIZABETH A. TAYLOR, HUSBAND AND WIFE, AND S. D. ALEXANDER,
Appellees.

Upon Appeals From the United States District Court for the District of Oregon

Brief for Appellees Henry B. Taylor and Elizabeth A. Taylor, Husband and Wife, in Answer to Appellants and Cross Appellant The United States of America, as Trustee and Guardian and Ex Rel. of the Estates and Persons of Jasper Grant and Harold F. Thornton

PREFACE

We have incorporated under the same cover the responding Brief of Appellees Taylors to that of Appellants and Cross Appellant. We have identified

appropriately the part relating to the contentions of each, the Appellants and the Cross Appellant.

* * *

STATEMENT OF THE CASE

We are offering the following Statement of Facts showing the more pertinent circumstances and events in their sequence as to time; persuaded that it may be of some aid to the Court for a better understanding of the question before it, the question being: What title or interest to the land in question was vested in the Appellees Taylors as of the time this suit was instituted?

Cross Appellant, by its Complaint, alleges that the land in question was Indian allotment land held under trust patents, and that the documents issued by the Portland Office of the Bureau of Indian Affairs were ultra vires, and that they were procured through fraud upon the Bureau's officials and agents, and, therefore, they are void and convey no right or interest to Appellant Ernestine C. Siniscal and her successors in interest, Appellees Taylors.

The source of the interest in the title of Appellees Taylors finds its beginning in trust patents (Ex. 53) for allotments issued (Agreed Facts, Para. II., R. 21) on December 21, 1895 to Sandy Grant, Eliza Grant, Chancey Grant, Clara Grant and Captain Jack, Indians of the Rogue River Tribe. Upon the death of these Indians, their interests, pursuant to determination by the Secretary of the Interior, were declared to be (R. 22) in Jasper Grant and Harold F. Thornton (Ex. 54) as heirs of such allottees, each

taking an undivided one-half interest in the several allotments.

From twenty to thirty years before the sale herein referred to was made, the Indians had been trying to sell the property in question (R. 556).

On May 16, 1951, Patrick L. Gray, a Forester of the Land Department of the Bureau of Indian Affairs, filed his appraisement (Ex. 13, R. 144) certifying the value of the land in question to be $135,000.00.

On July 13, 1951 (R. 152), Jasper Grant and Harold F. Thornton signed and filed with the Portland Office of the Bureau of Indian Affairs their respective Consents (Exs. 13 & 12, R. 157 & 155) to sell the land in question for $135,000.00, each to receive the sum of $67,500.00 as his proportionate share.

On August 3, 1951, one William F. Brenner, initially one of the defendants in this suit (R. 663 & 859) came to the ranch of Appellees Taylors in the vicinity of Antelope, Oregon (R. 661) and solicited them to help finance the buying of timber land in Curry County, Oregon.

On August 5, 1951, (R. 686 & 865), Appellee Henry B. Taylor went to Gold Beach, Oregon, and inspected the land.

On August 7, 1951, at about one o'clock P. M. (R. 881), Appellant Ernestine C. Siniscal, accompanied by her attorney and Appellee Henry B. Taylor, met in the office of the latter's attorney, at which time Appellant Ernestine C. Siniscal signed a Deed (Ex. 3, R. 436) to the land in question in

favor of Appellees Taylors, and at that time agreed to sell the property to the Appellees Taylors for the sum of $160,000.00. The executed Deed was at that time left in the custody of Appellant Ernestine C. Siniscal's attorney (R. 669) to be held until the transaction was consummated.

On August 7, 1951, and after the meeting referred to in the last paragraph, at about two o'clock P. M. (R. 884), Appellant Siniscal, in company with her attorney and Appellee Henry B. Taylor, went to the Portland Office of the Bureau of Indian Affairs, at which time Appellee Henry B. Taylor gave to F. E. LaFrance, Clerk in the Portland Office of the Bureau of Indian Affairs a cashier's check (Ex. 1, R. 194) for $135,000.00. At that time, Appellant Siniscal, an enrolled Indian (Ex. 61-D), signed an Application to Remove Restrictions (Ex. 9, R. 172) which had been prepared by Mr. LaFrance, the Clerk in the Portland Office. Mr. LaFrance also prepared an Order Transferring Inherited Interests (Ex. 5, R. 163) and an Order Removing Restrictions (Ex. 4, R. 163), and these, together with other documents including the Certificate of Appraisement, were presented to E. Morgan Pryse, the Area Director of the Bureau of Indian Affairs, and which he thereupon signed (R. 342 & 343). At that time Appellant Ernestine C. Siniscal was given the Order Transferring Inherited Interests (Ex. 5) and the Order Removing Restrictions (Ex. 4) and the Receipt for $135,000.00 (Ex. 73). The latter recited that the check (Ex. 1, R. 194) was from Appellee Henry B. Taylor, and that the deposit was to be held pending approval of the Deed and the removal of restrictions as to Allotments R-80, 82, 83, 84 and 103.

On August 7, 1951, and after the transaction at the Portland Office of the Bureau of Indian Affairs referred to in the preceding paragraph (R. 670), Appellant Siniscal and her attorney went with Appellee Henry B. Taylor to the office of the latter's attorney (R. 670) at which time the Deed (Ex. 3, R. 436) was delivered to Appellee Henry B. Taylor, and Appellant Siniscal and the Appellees Taylors signed an Escrow Agreement (Ex. 2-A, R. 433) whereby a check for $25,000.00 (Ex. 2-B, R. 441) in favor of Appellant Siniscal was placed in the custody of the United States National Bank of Portland (Oregon) as Escrow Agent on the condition that the same was to be delivered to Appellant Siniscal upon an opinion being given by the attorney for Appellees Taylors that the Taylors were vested with a merchantable title.

At this same time, the Order Transferring Inherited Interests (Ex. 5) and the Order Removing Restrictions (Ex. 4) also were delivered to Appellees Taylors or their attorney, and they were immediately placed of record, as is evidenced by the endorsement of the County Clerk of Curry County on the several documents, that is, Exhibits 3, 4 and 5.

On August 7, 1951, and some time after the transaction last referred to, the Appellees Taylors gave to William F. Brenner and wife and Fred M. Marsh and wife an Option (Ex. 6, R. 109) whereby the latter were privileged to purchase the property in question for $300,000.00 on or before March 10, 1952. This document also was placed of record immediately, as evidenced by the filing date thereon.

On August 7, 1951, and while the foregoing was taking place in the office of the attorney for Appellees Taylors, the Portland Office of the Bureau of Indian Affairs (R. 191, 192 & 346) transmitted with covering letters (Exs. 14 & 15) to the Land Department of the Bureau of Indian Affairs, Washington, D.C., duplicates of the Order Removing Restrictions and the Order Transferring Inherited Interests.

On August 24, 1951 (R. 196), the Portland Office of the Bureau of Indian Affairs transmitted to the office of the Bureau in Washington, D.C., a copy of the Order Transferring Inherited Interests to Appellant Siniscal (Ex. 5, R. 163), a copy of the Order Removing Restrictions (Ex. 4, R. 181), and a copy of the Warranty Deed from Appellant Siniscal to Appellees Taylors (Ex. 3, R. 436), together with a request dated August 17, 1951, that a patent be issued to Appellees Taylors (Exs. 23-A and 23-B). The concluding paragraph of this application reads, as follows:

> "It has been reported to the undersigned that the documents above-described are sufficient to establish in the undersigned a fee simple title in said lands; however, title insurance companies of the State of Oregon are disinclined to issue Certificates of Title, insuring title on lands to which no patent has even been issued."

Immediately after the payment of the $135,000.00 to the Treasurer of the United States, a part of the money was turned over to Jasper Grant and Harold F. Thornton, and the balance was deposited with the Portland Trust & Savings Bank as Conservator for the Indians (R. 554 & 572).

On issues framed as to fraud of the various defendants, and ultra vires acts by officials of the Bureau of Indian Affairs, the case went to trial, and the Court made Findings of Fact. The only Findings as to specific acts of fraud were that Appellant Siniscal misrepresented her financial worth (Fdg. VI., R. 57), and information was withheld from the Bureau of Indian Affairs that Appellant Siniscal planned to re-sell the land to Appellees Taylors (Fdg. VII., R. 58). The Court held that the $135,000.00 paid for the land was inadequate (Fdg. VIII., R. 58), and formulated the Conclusion of Law (Concl. III., R. 69) that the acts of E. Morgan Pryse in executing the documents in question, that is, the Order Transferring Inherited Interests and the Order Removing Restrictions (Exs. 5 & 4) were ultra vires.

The Court found that good cause existed for return to Appellees Taylors of the money they had paid to the Treasurer of the United States, the same to be made up of the money in possession of the Portland Trust Savings Bank belonging to the Indians, together with enough from the proceeds of a re-sale of the Indians' lands to make up the difference.

The issue before the Court tendered by Appellants is that the Court erred in rescinding the sale and cancelling the documents.

The issue before the Court as to Cross Appellant is that the Court had no power to find that good cause existed for return to Appellees Taylors of the $135,000.00 and to allow interest thereon from July 18, 1952.

BRIEF OF APPELLEES TAYLORS DIRECTED TO THE CONTENTIONS OF APPELLANTS

Argument

Appellees Taylors can take issue with Appellants in one respect only, and that is contingent.

Our only possible disagreement with the Appellants could arise if this Court affirmed the Decree of the Lower Court in respect to the Order Transferring Inherited Interests, the Order Removing Restrictions, and the Deed from Appellant Ernestine C. Siniscal to the Appellees Taylors, and yet reserved for consideration the possibility of ruling adversely to the Lower Court as to the Escrow Agreement.

Obviously, if the Order Transferring Inherited Interests, the Order Removing Restrictions and the Deed are set aside, then the condition under which the Appellants are to be paid the $25,000.00 fails. This assertion is based upon the condition of the Escrow Agreement (Ex. 2-A, R. 434) which provides that the $25,000.00 payable under the Escrow Agreement to Appellant Siniscal (R. 434) shall be paid at such time as the attorneys for the Appellees Taylors shall render an opinion that "a merchantable title is vested in Henry B. Taylor and Elizabeth A. Taylor" to the property in question.

Manifestly, an opinion that the Appellees Taylors have a merchantable title cannot be given if the muniments of title upon which the same must be based have been declared void.

The Court's Decree in this respect declares a result that was but the corollary to the other parts of the Decree. If the Deed is declared void, then there could be no merchantable title in the Appellees Taylors, for they would have no title at all.

If, therefore, it is the contention of Counsel for Appellants that the Lower Court's Decree should be reversed in regard to the Escrow Agreement, although the remainder of the Decree may stand affirmed, then we are in disagreement with the Appellants only in that regard.

In respect to the principal contention of Appellants, which is that there was no showing of fraud, or, in any event, not a sufficient showing to set aside the transaction, we recognize that one of the essential elements of fraud is that the party who claims to have been injured did in fact rely on the fraud or misrepresentation. It is obvious that the Government did not rely on the representations of Appellant Ernestine C. Siniscal as to her financial status in her Application to Remove Restrictions. She showed a net worth of only $20,000.00, and yet she was purchasing property for $135,000.00.

The Bureau of Indian Affairs certainly was not mislead as to the interest Appellees Taylors had in the transaction, for the check for $135,000.00 shows on its face that it was purchased by "Ben Taylor" (Appellee Henry B. Taylor). This was also brought to the Indian Bureau's attention through the official receipt (Ex. 73) which it issued.

As to the contentions that the acts were ultra vires, E. Morgan Pryse, the Area Director, and Francis

E. LaFrance, an employee of the Bureau of Indian Affairs, both cited the statutes and the rules and regulations, under which they acted, in preparing and executing the documents.

Except as heretofore indicated, we submit that Appellants' contentions should be sustained.

Respectfully submitted,

WILBER HENDERSON,
Counsel for Appellees
Henry B. Taylor and
Elizabeth A. Taylor.

BRIEF OF APPELLEES TAYLORS DIRECTED TO CONTENTIONS OF CROSS APPELLANT UNITED STATES OF AMERICA, AS TRUSTEE AND GUARDIAN AND EX REL. OF THE ESTATES AND PERSONS OF JASPER GRANT AND HAROLD F. THORNTON

SUMMARY OF ARGUMENT AS TO 1, 2, AND 3, SPECIFICATIONS OF ERROR BY CROSS APPELLANT

A Court of Equity, in the exercise of its power, is not circumscribed by any fast or technical rules, and, therefore, when the Lower Court decided (Fdg. XII, R. 59 & Concl. IX, R. 62) that a good cause exists for the return to Appellees Henry B. and Elizabeth A. Taylor of the sum of $135,000.00 which they had paid to the Treasurer of the United States, the Court was acting within the scope of the discretion with which it is clothed. Findings of Fact shall not be set aside unless clearly erroneous (Federal Rules of Civil Procedure 52(a)). The record in this case reveals nothing as to the conduct of Appellees Henry B. and Elizabeth A. Taylor inconsistent with the Court's Finding and Conclusion that a good cause does exist for return of the money. The Court was conforming strictly with the rule of the Supreme Court of the United States and the Federal Courts, and was especially within the Court's ruling in the case of *Heckman v. United States*, 224 U. S. 413 (cited by Counsel for Cross Appellant in support of their contentions) in directing that Appellees Taylors be reimbursed, *not from the Treasury of the United States*, but from the amount of money they had paid for the land from (a) the money in possession of the Portland Trust & Savings Bank as Con-

servator of Jasper Grant and Harold F. Thornton remaining from the original amount paid by Appellees Taylors, and (b) the balance from the proceeds of the re-sale of the lands in question.

ARGUMENT

The United States of America, as Trustee and Guardian and Ex Rel. of the States and Persons of Jasper Grant and Harold F. Thornton, by this suit invoked the equity powers of the District Court to rescind a transaction, the final incident of which was the execution and delivery of a Deed conveying 800 acres of land in Curry County, Oregon to the Appellees Taylors. Cross Appellant The United States of America, by the prayer of its Complaint (R. 11) asked that certain documents be decreed null and void, or that they be set aside and the beneficial ownership of the lands in question be restored to the Indians "upon such terms as the Court may deem equitable."

Fraud is laid as the basis for the rescission, and it also is alleged that the acts of the Area Director in executing the documents in question were ultra vires. No claim is made that any one fraudulently deceived or made any misrepresentations of fact, or mislead *either of the alleged wards,* that is, Jasper Grant and Harold F. Thornton. The Findings of the Court suggest constructive fraud only, and that, apparently, was inferred by the Court from acts of the officials of the Bureau of Indian Affairs in executing the documents in question.

The Court by Decree (R.66-69) restored the status quo of the title to the property as of before the vari-

ous documents and the Deed were given, and in the exercise of the discretion with which a Court of Equity is endowed found that a good cause existed therefor (R. 59 & 62), and directed (R. 63 & 68) that the money remaining in the possession of the Portland Trust & Savings Bank as Conservator of Jasper Grant and Harold F. Thornton, which they had received for the land, should be turned over to the Appellees Taylors. It was further ordered that this amount be supplemented by proceeds from the resale of the land in an amount sufficient to make up the full amount of the $135,000.00 (R. 68 & 69).

The Decree makes no provision for the payment of any sum of money whatsoever *by the United States of America* (R. 66-69). Cross Appellant challenges the right of the District Court to make provision for return of the money. It heretofore was pointed out that Cross Appellant, by the prayer of its Complaint, had asked relief *upon such terms as the Court might deem equitable,* and in the exercise of the discretion with which the Court was clothed, it found as a fact (Fdg. XIII., R. 59), as follows:

> "Good cause exists for the return to Henry B. Taylor and Elizabeth A. Taylor the sum of $135,000.00 turned over by them to the Area Director of the Bureau of Indian Affairs for the account of Harold Thornton and Jasper Grant."

The Court, applying equitable principles to the facts, formulated a Conclusion of Law (Concl. IX., R. 62), as follows:

> "Good cause exists for the return to Henry B. Taylor and Elizabeth A. Taylor the sum of

> $135,000.00 together with interest at the rate of 6% per annum from July 18, 1952, turned over by them to the Area Director of the Bureau of Indian Affairs for the account of Harold Thornton and Jasper Grant."

It is asserted by Counsel for Cross Appellant that the Finding (Fdg. XII., R. 59) is not a true Finding of Fact, but is a conclusion of facts. Obviously, it is the summation of all the facts which came to the Court's attention during the trial, and which the Court felt constituted good cause for the return of the money. "Good cause" as a fact belongs in the same category with "fraud," "negligence," and other legal terms that really are the summary of various independent facts.

SCOPE OF EQUITY POWER

An Equity Court, to make a finding that good cause exists for any particular reason, is no more circumscribed in its power than it is to conclude that a particular transaction was or is "fraudulent." The power, authority and right to decide either as to "good cause" or as to "fraud" finds its source in the same general power of a Court of Equity. Either one of such findings does not nullify, necessarily, the other. It readily is conceivable that a Court might make a finding of fraud to support a decree of rescission if it could palliate the consequences thereof, where otherwise, it might be constrained to withhold such finding of fraud. That is an inherent right and power of a Court of Equity.

Cross Appellant, by its contention under the Specifications of Error now being considered, would deny

a Court of Equity to which it appealed for aid the very right and power which distinguishes such Court from a Court of Law.

An excellent statement as to the scope of the discretion of a Court of Equity is found in the Opinion in the case of *Bowen v. Hockley,* 71 Fed. (2d) 781, at Page 786. We quote therefrom, as follows:

> "One of the glories of equity jurisprudence is that it is not bound by the strict rules of the common law, but can mold its decrees to do justice amid all the vicissitudes and intricacies of life. The principles upon which it proceeds are eternal; but their application in a changing world will necessarily change to meet changed situations. If relief had been granted only where precedent could be found for it, this great system would never have been developed; and, if such a narrow view of equitable powers is adopted now, the result will be the return of the rigid and unyielding system which equity jurisprudence was designed to remedy."

The Court then cited as authority in support of the foregoing *Professor Pomeroy (Equity Jurisprudence) (4th Ed.)*) Sec. 60, from which we have culled the following.

> "In fact, there is no limit to the various forms and kinds of specific remedy which he may grant, adapted to novel conditions of right and obligation, which are constantly arising from the movements of society. While it must be admitted that the broad and fruitful principles of equity have been established, and cannot be changed by any judicial action, still, it should never be forgotten that these principles, based as they are upon a Divine morality, possess an

inherent vitality and a capacity of expansion, so as ever to meet the wants of a progressive civilization."

The foregoing are but expressions of opinion as to an Equity Court's power as universally recognized and applied.

FACTUAL BASIS FOR GOOD CAUSE

The Trial Judge, who had an opportunity to see the witnesses as they gave their testimony, was in a more advantageous position to determine whether or not a "good cause" did exist for return of the money than one who has but the written record upon which to base a conclusion. We, in this connection, will call attention to some of the more pertinent facts and circumstances.

Since the chronological sequence of the events is of itself not without significance, we will first direct attention to the fact that no claim is made by the Cross Appellant that the Appellees Taylors knew of the land in question, or anything about it whatsoever before *August 3, 1951* (R. 663 & 859). Appellees Taylors were solicited at that time by one William F. Brenner (originally one of the defendants in this suit) for assistance in the financing of the purchase of the land in Curry County (R. 663 & 859). The Trial Court, having the foregoing in mind, considered the following:

(a) The Certificate of Appraisement which formed the basis for selling the land for *$135,000.00* was made and filed with the Portland Office of the Bureau of Indian Affairs on *May 16, 1951,* (Ex. 13,

R. 144 & 145), and *long before* Appellees Taylors had any information in regard to the land, or entered upon the scene. The appraiser, Patrick L. Gray, was a Forester employed by the Land Division of the Bureau of Indian Affairs (R. 516), and there is no evidence that any one ever sought to influence him in regard to the nature of the appraisement he made.

(b) Jasper Grant and Harold F. Thornton signed and lodged with the Portland Office of the Bureau of Indian Affairs on *July 13, 1951,* their Consents (Ex. 12, R. 155, and Ex. 11, R. 157) *long before* Appellees Taylors entered into negotiations for purchase of the land. Neither Grant nor Thornton had ever met Appellees Taylors before August 7, 1951, or for that matter at any time before the time of the trial (R. 522 & 567). By these Consents (Ex. 11 & 12), the Indians agreed to sell the land for *$135,000.00,* of which each was to receive *$67,500.00.*

(c) Appellees Taylors never had any conversation whatsoever with E. Morgan Pryse, the Area Director, who executed the documents in question (R. 283), and Pryse did not know either of them.

(d) Appellees Taylors' check (Ex. 1, R. 194) for $135,000.00 was payable directly to the Treasurer of the United States, and it bore upon its face the notation, "Purchased by Ben Taylor," (Ben Taylor being Appellee Henry B. Taylor, R. 887). This eliminates any suggestion that Appellees Taylors were endeavoring to conceal their identity, or *the source of the money* paid to the United States. In this connection, Francis E. LaFrance, who handled the transaction at the Portland Office, testified (R. 186) that he was

introduced to Mr. Taylor on August 7, 1951, and *he was handed the check* (Ex. 1, R. 194) *by Mr. Taylor* for $135,000.00.

(e) The Bureau of Indian Affairs issued a receipt (Ex. 73, R. 187) showing that the check was to be held subject to approval of the documents, and, also, identifying Taylor as the purchaser of the bank draft. We quote therefrom, as follows:

> "Cashier's check No. 14-22742, drawn on Bank No. 96-331/1232 payable to Treasurer of the United States, in amount of $135,000.00. *Notation on check*: Purchased by Ben Taylor."
>
> * * *
>
> "To be held in Special Deposits account of Ernestine C. Siniscal pending the approval of Deed and recordation of Removal of Restrictions covering Public Domain Lands, allotments R-80, 82, 83, 84 and 103."

(f) Ordinarily, stealth, secrecy and concealment are concomitants of fraud, and yet the Appellees Taylors throughout the transaction were open and aboveboard in everything they did in connection with the transaction. They placed of record immediately the Order Transfering Inherited Interests (Ex. 5, R. 163), the Order Removing Restrictions (Ex. 4, R. 181), and the Warranty Deed (Ex. 3, R. 436), as is evidenced by the endorsement of recording of the County Clerk of Curry County, Oregon, appearing upon such exhibits, that is, Exhibits 3, 4 and 5.

(g) The Court also must have considered the letter from the Area Office (Ex. 14), dated August 7, 1951, to the Commissioner of Indian Affairs, Wash-

ington, D. C., transmitting to that office copies of the Order Transferring Inherited Interests and the Application for Removal of Restrictions, which read in part, as follows (R. 346):

> "Simultaneously with the approval of the order transferring inherited interest, the purchaser applied for removal of restrictions."

This demonstrated that the local office, was apprising the office at Washington of exactly what had been done.

(h) The Court also had for consideration the testimony of E. Morgan Pryse, the Area Director (R. 332, et seq.), in which he cited the law and the regulations which he considered authorized each and every act in this transaction. As to the signing of the Order Transferring Inherited Interests (Ex. 5, R. 163), see R. 332; as to the Order Removing Restrictions (Ex. 4, R. 181) see R. 333; for authority to take the Application Removing Restrictions (Ex. 9, R. 172), see R. 333; for procurement of the Consents of Sale (Ex. 11 & 12, R. 157 & 155), see R. 333, 334 and 336; as to authority for obtaining the Certificate of Appraisement (Ex. 13, R. 144), see R. 336 and 337; for authorization of the Area Office to receive money for the Indian land and the issuance of a receipt therefor (Ex. 73), see R. 338. This record discloses that the Area Director, in all of the acts done and performed and in executing the documents, was acting according to some statute or regulation.

(i) According to the testimony of E. Morgan Pryse (R. 350), two or three transactions, similar to the one in question, were being cleared through

the Portland Area Office *each week*. A legal advisor of the Portland Area Office (Ex. 26, R. 348) gave as his opinion that the "Order Removing Restrictions" as soon as issued placed the land on a taxable basis.

(j) F. E. LaFrance testified (R. 188) that his authority for preparing the Order Transferring Inherited Interests was found in Section 202.04 (C) (2) of the Indian Affairs Manual, which reads in part:

> "Heirship allotments in cases where one or more of the heirs are shown to be incompetent to manage their affairs may be conveyed in restricted title status by an 'Order Transferring Inherited Interests.' * * *"

(k) E. Morgan Pryse testified (R. 346) that his authority for issuing the Order Removing Restrictions was found in Section 201.06 of the Manual (Ex. 41).

The last three items are especially pertinent to the Finding that these acts were ultra vires. At no juncture of this case has the inapplicability of these sections been demonstrated, and the only basis for the contention of ultra vires is that Ernestine C. Siniscal, in making her application (Ex. 9, R. 172) exaggerated her financial worth (Fdg. VI., R. 57). She represented her net worth to be approximately $20,000.00 This, however, was so far short of the $135,000.00 she was making in payment for the land that it hardly could have been assumed by the Bureau of Indian Affairs that she was providing the purchase money herself. E. Morgan Pryse testified (R. 342) that he examined the application, and that he was aware of the representations she made as to her financial worth.

This is not a case where the money was paid directly to the Indians. Neither is it a case where the Appelees Taylors in any way imposed upon the Indians. As heretofore pointed out, Jasper Grant and Harold F. Thornton both testified that they had never met Appellees Taylors before August 7, 1951 (R. 552 & 567). The record shows that they had signed their Consents to sell the land (Ex. 11 & 12, R. 157 & 155) approximately one month before the Appellees Taylors entered the transaction. No evidence was offered or received that in the slightest degree tended to establish that either Appellee Henry B. Taylor or Appellee Elizabeth A. Taylor ever made any misrepresentation of fact to either of the Indians, or to any agent or officer of the Bureau of Indian Affairs. Counsel for Cross Appellant have not pointed to one iota of evidence that in any way connects either of the Appellees Taylors with any act suggesting fraud or misrepresentation.

The context of the foregoing items of evidence which we have pointed out standing alone furnish ample basis for the Court's Finding as to "good cause." If read, however, with the entire record, the significance thereof becomes more manifest. The Court could well conclude therefrom that there was good cause for returning to Appellees Taylors the money they had paid by check to the Treasurer of the United States.

EFFECT OF RULE 52(a), CIVIL PROCEDURE

We assume that it will be conceded that the burden is upon him who attacks a Finding to show that it is clearly wrong before it will be set aside. The only at-

tempt Cross Appellant has made to show that the Court's Finding of "good cause" is wrong is through argument that it is contrary to the Court's Finding of fraud. Counsel have cited no rule of law to the effect that one of the foregoing Findings necessarily contradicts the other. Neither have they cited any authority to the effect that one Finding must give way or yield in force and effect to another.

As a matter of fact, the Findings are not contradictory. The Court, apparently, concluded that the constructive fraud which it made the basis for rescission was not of such a nature or so attributable to Appellees Taylors as to justify withholding from such Appellees the money they had paid under the circumstances.

The *Federal Rules of Civil Procedure* furnish the guide as to the effect that should be given Findings. We refer to that part of *Rule 52* which prescribes its own effect. The Supreme Court of the United States, in the case of *United States v. National Association of Real Estate Boards,* 339 U. S. 485, had occasion to interpret this rule. It had under consideration an appeal from a judgement of dismissal on the charge that several defendants were engaged in a price-fixing conspiracy to violate the Sherman Act. The Trial Court's Findings, inter alia, found that two of the defendants *did not conspire* with the Washington Board to fix prices. The Court observed (Page 494):

> "No more particularized findings were made. Appellant asks us to set aside that ruling. The question is whether we may do so in light of Rule 52 of the Federal Rules of Civil Procedure, 28 U.S.C.A., which provides in part:

'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness.' "

* * *

"It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Courts apparently deemed innocent. See *United States v. Yellow Cab Co.*, 338 U.S. 338, 342, 70 S. Ct. 177, 179; *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-395, 68 S. Ct. 525, 541, 92 L. Ed. 746. We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous. (Page 495):

* * *

"The judgement of the District Court is reversed except as to the National Association and Nelson; and as to them it is affirmed."

Directed to the same question, and with the same construction of Rule 52 (a), are the following cases:

Pacific Portland Cement Co. v. Food Mach. & Chem. Co., 178 Fed. (2d) 451 (Ninth Circuit);

Remington Rand, Inc. v. Society Internationale, 188 Fed. (2d) 1011;

Barry v. Lawrence Warehouse Company, 190 Fed. (2d) 433 (Ninth Circuit);

J. P. (Bum) Gibbons, Inc. v. Utah Home Fire Insurance Co., 202 Fed. (2d) 473.

The Court having made the Finding that a good cause exists, and Counsel for Cross Appellant having failed to show that the Finding is *clearly wrong,* it is submitted that the same must be sustained.

HECKMAN CASE

Counsel for Cross Appellant contend that under the ruling of the Supreme Court in the case of *Heckman v. United States,* supra, and the cases based thereon, that the Court, having rescinded the sale or transaction, was without power or authority to return the money. It is our contention that there is nothing in the *Heckman Case* to compel any such conclusion, but rather the very reverse.

The Heckman Case was before the Supreme Court on appeal from a Decree of the Circuit Court of Appeals' reversing an Order sustaining a Demurrer to a Complaint. In other words, the Court had for consideration only the sufficiency of the allegations of the Complaint. It was alleged that various persons obtained deeds or conveyances from members of the Cherokee Nation at a time when such lands were subject to a restriction on the power of alienation. In that case, the various Indians had given deeds or conveyances, and the suit was for the purpose of setting the same aside on the grounds that the Indians were without authority to convey. The actual title was vested in the Indians, but the right of alienation was subject to certain restrictions. In the instant case, the Indians held an inherited interest in "Trust Patents," and the documents, the subject of the suit, were executed by officials of the Bureau of Indian Affairs and *not by the Indians* themselves. The only

document executed by the Indians were the Consents (Exs. 11 & 12, R. 157 & 155), and they were not procured by any of the parties defendant. The Cross Appellant did not ask that the "Consents" be set aside. The Consents had been prepared and were signed in the office of the Bureau of Indian Affairs (R. 152). The foregoing may not have too much to do with the legal question involved, but in the interest of accuracy, we call it to the Court's attention.

The part of the *Heckman* appeal pertinent to this cause begins on Page 446 of Volume 224 of U. S. Reports, and for convenience and ready reference, the same is herein set out, as follows:

> "It is said that the allottees have received the consideration, and should be made parties in order that equitable restoration may be enforced. Where, however, conveyance has been made in violation of the restrictions, it is plain that the return of the consideration cannot be regarded as an essential prerequisite to a decree of cancelation. Otherwise, if the Indian grantor had squandered the money, he would lose the land which Congress intended he should hold, and the very incompetence and thriftlessness which were the occasion of the measures for his protection would render them of no avail. The effectiveness of the acts of Congress is not thus to be destroyed. The restrictions were set forth in public laws, and were matters of general knowledge. Those who dealt with the Indians contrary to these provisions are not entitled to insist that they should keep the land if the purchase price is not repaid, and thus frustrate the policy of the statute. *United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160, 170, 171, 34 L. ed. 640, 644, 11 Sup. Ct. Rep. 57.

"But it is suggested that there may be instances where the consideration could be restored without interfering with the policy which prohibited the transfer; that is, without in any way impairing the right to the recovery of the land or the assurance to the Indian of his possession free from encumbrance. It is said, for example, that there may have been an exchange of lands, and that the Indian grantor should not, on retaking the restricted lands, be permitted at the same time to retain those which he has received from the grantee. Or there may be other property held by the Indian grantor free from restrictions, so that restoration of the consideration may be enforced without working a deprivation of the restricted lands, contrary to the act of Congress. We need not attempt to surmise what cases of this sort may arise. It is sufficient to say that no such case is here presented. *It is not presented by the mere allegation of the bill that the conveyances assailed purport to have been made for pecuniary consideration. It will be competent for the court, on a proper showing as to any of the transactions that provision can be made for a return of the consideration, consistently with the cancelation of the conveyances and with securing to the allottees the possession of the restricted lands in accordance with the statute, to provide for bringing in as a party to the suit any person whose presence for that purpose is found to be necessary.*" (Emphasis ours)

In the instant case, the "pecuniary consideration" is the very thing in regard to which Cross Appellant has brought this case to this Court. Jasper Grant and Harold F. Thornton are before the Court, so we have in this case the very situation which the

Court must have had in mind when it wrote the foregoing, viz., (Page 447):

> "It is not presented by the mere allegations of the bill that the conveyances assailed purport to have been made for pecuniary consideration. It will be competent for the court, on a proper showing as to any of the transactions that provision can be made for a return of the consideration, consistently with the cancelation of the conveyances and with securing to the allottees the possession of the restricted lands in accordance with the statute, to provide for bringing in as a party to the suit any person whose presence for that purpose is found to be necessary."

Both Jasper Grant and Harold F. Thornton were called as witnesses by the Cross Appellant, and gave testimony (R. 549, et seq. and R. 566, et seq.) to the effect that, among other things, they received $67,500.00 each, and that some part of the money was then on deposit with the Portland Trust & Savings Bank. The parties were before the Court, and the pecuniary consideration was in issue, which are precisely the things referred to in the *Heckman Case* as the basis for return of the consideration. It seems to us that there could not be a case falling more clearly within the last quoted language of the *Heckman Case* than the one now before the Court. If it is not applicable here, it has no meaning at all, for in this case the conditions are present that are laid down in the *Heckman Case* as prerequisite for the relief given.

Counsel for Cross Appellant also cite the case of *Hall v. United States*, 201 Fed. (2d) 886, but the

Court in that case, in effect, confirmed what we have just said relative to the *Heckman Case,* and in support thereof, we quote from Page 887, as follows:

> "The subsidiary question presented is that the court should have in any event required restoration of the consideration paid by the appellant to the restricted Indian for the void lease. No request was made that the allottee, Jane Robinson, be made a party to the action for this purpose. See *Heckman v. U. S.,* 224 U.S. 413."

That language can mean only that if Jane Robinson had been made a party, the request for return of the consideration would have received proper attention by the Court.

Counsel for Cross Appellant cite, also the cases of *United States v. Rickert,* 188 U.S. 432, *Minnesota v. United States,* 305 U.S. 382, *United States v. Trinidad Coal & Coking Co.,* 137 U.S. 160, *United States v. Gilbertson,* 111 Fed. (2d) 978, *Causey v. United States,* 240 U.S. 399 and *Pan-American Petroleum Co. v. United States,* 273 U.S. 456, in regard to which we suggest that the true function of a precedent is to illustrate a principle. Such principle, however, to be applicable, must in some measure deal with a comparable factual situation. A reading of the six cases just referred to will disclose readily that they are not precedents for the question now before the Court. We have here as the basis for the Court's action *a Finding that a good cause does exist for the return of the consideration.*

CONCLUSION AS TO 1, 2, AND 3, SPECIFICATIONS OF ERROR OF CROSS APPELLANT

I. A Court of Equity is not circumscribed by fast and technical rules as to how it should exercise its discretion.

II. Findings of Fact by a Court of Equity are not to be set aside unless shown to be clearly erroneous.

III. The record supports the Court's Findings that a "good cause" does exist for return of the consideration.

IV. *Heckman v. United States,* supra, is authority for the proposition that where in an Indian land case the pecuniary consideration is an issue, and the parties who received the consideration are before the Court, it may consider and pass upon whether or not the consideration shall be returned.

We respectfully submit that the Court, in requiring that the money in the hands of the Portland Trust & Savings Bank should be returned to Appellees Taylors, acted within its authority, and that it also acted within the scope of its authority in directing that the land in question be re-sold, and that from the proceeds thereof a sufficient amount to make up the $135,000, after applying the money received from the Portland Trust & Savings Bank, should be paid to the Appellees Taylors.

AS TO CROSS APPELLANT'S 4TH SPECIFICATION OF ERROR

Counsel for Cross Appellant assert that the Court erred in ordering the payment of interest on the money which it decreed should be repaid to the Appellees Taylors. What we heretofore have said in respect to Specifications of Error, 1, 2 and 3 applies with equal force to this alleged Specification of Error.

Appellees Taylors, on August 7, 1951, paid to the Treasurer of the United States the sum of $135,000.00. The Decree directs payment of interest only from July 18, 1952, that is, the interest is not to begin accruing until approximately one year after the money was paid.

It appears from the record (R. 554 & 572) that some time immediately after the money was paid to the Bureau of Indian Affairs a substantial part of it was delivered to the Portland Trust and Savings Bank as Conservator for Jasper Grant and Harold F. Thornton. Since under the general rule applicable to guardians, the guardian is charged with the duty of keeping the ward's funds invested, it is but fair to assume that a substantial part of the money received by the Portland Trust and Savings Bank *has been drawing interest.*

The amount of interest payable under the Decree would have been negligible had the Decree been carried out, for under the regulations of the Bureau of Indian Affairs, a sale by public bid may be made after the same has been advertised for thirty days

(Regulation 202.04 D (e), Indian Affairs Manual, Ex. 41). The Appellants posted no supersedeas bond, and, therefore, there was no hindrance to a sale, and it could have been effected in the early part of September, 1952. The Court imposed no delay by anything provided-for in the Decree, as suggested by Counsel for Cross Appellant on Page 24, of its Brief.

Counsel for Cross Appellant submitted as a legal basis for their argument under this Specification of Error the decision of the Court in the case of *United States v. Sherman,* 98 U.S. 565. We can find nothing in that case at variance with the Court's Decree. The *Sherman Case* was one in which the Relator, one Alexander McLoud, asked for a Writ of Mandamus to compel John Sherman, Treasurer of the United States, to pay interest on a judgment obtained against one T. C. Callicot. Callicot was an agent of the Treasury Department, and the United States became liable to pay the judgment *only on issuance of a Certificate of Probable Cause.* The Certificate was issued, and McLoud received $12,039.50 on the judgment, which was originally for $11,700.68. The interest sought by the Relator was interest *that had accrued before the issuance of the Certificate of Probable Cause,* and the Court very properly held that there was nothing in the statute authorizing interest before that date. The *Sherman Case* in no way bears upon the subject of limiting the discretion of a Court of Equity.

Counsel for Cross Appellant suggest that although the money is not to be paid by the Government, nevertheless, because the Indians are wards of the

Government, the rule as to the immunity of the sovereign against the payment of interest applies. This claim is not tenable, as was demonstrated in the case of *Miller v. Robertson,* 266 U. S. 243 wherein the Treasurer of the United States, the Alien Property Custodian and Aliens were defendants. The Court in that case pointed out that the essential condition as to sovereign immunity was that the claim be against the sovereign itself, that is, against the United States.

The Court held in the case just referred to *(Miller v. Robertson)* that a Court of Equity will not disturb a Finding as to interest unless it is apparent that there has been a clear abuse of discretion.

To the same effect are the cases of *Anderson Meyers Co. v. Fur & Wool Trading Co.,* 14 Fed. (2d) 586 (Ninth Circuit), *In Re: Paramount Publishing Corporation,* 85 Fed. (2d) 42, and *Giurlami & Brother v. Commissioner of Internal Revenue,* 119 Fed. (2d) 852.

We respectfully submit that the Court's award of interest in this case is clearly within its discretion, and since Counsel for Cross Appellant have not shown that there was a clear abuse of discretion, the Conclusion of Law of the Lower Court as to interest should be sustained.

CONCLUSION AS TO CONTENTIONS OF CROSS APPELLANT

It is submitted that Counsel for Cross Appellant have failed completely to show that the Lower Court's Finding of good cause for return of the money to Appellees Taylors is clearly erroneous. The Lower Court's Decree directing that the $135,000.00, which was received by the Treasurer of the United States and then turned over to Grant and Thornton, be reimbursed to the Appellees Taylors from the amount thereof remaining in possession of the Portland Trust and Savings Bank and the balance made up from a re-sale of the lands, is based upon a Finding made by a Court of Equity acting within the scope of its authority.

It is submitted that the Lower Court's Decree as to return of the principal sum of $135,000.00 with interest thereon from July 18, 1952, should be affirmed.

Respectfully submitted,

Wilber Henderson,
Counsel for Appellees
Henry B. Taylor and
Elizabeth A. Taylor.